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STATE OF MINNESOTA

IN SUPREME COURT

A07-1918 & A07-1930

Moorhead Economic Development Authority, petitioner, )  
 Respondent, )  
 vs. )  
 Roger W. Anda, et al., )  
 Appellant, )  
 Kjos Investments, )  
 Respondent-Below. )

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APPELLANT'S BRIEF

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## I. STATEMENT OF THE ISSUES

1. **In a quick take eminent domain action can the fair value paid for property be reduced for contamination discovered after a taking?**

The district court, disregarding uncontradicted expert testimony that the property did not lose its value until the public became aware of the contamination, held that the value would be reduced because of the contamination, and the valuation would be made as of the date of the condemnation commissioners' award entered twenty months later. The court of appeals, recognizing that "No cases in Minnesota squarely address the effect of contamination on the value of a condemned property when the contamination is discovered after the condemnation order.", agreed.

Minn. Stat. § 117.042, Fifth Amendment United States Constitution and Articles I, § 13, and XIII, § 4, Minnesota Constitution

2. **Can a property owner, not in exclusive control of property, be strictly liable as a matter of law for latent environmental problems discovered after a taking?**

The district court held that Anda had created a nuisance, was negligent and thus strictly liable, as a matter of law, supplying its own findings to support strict liability. The court of appeals held that the jury's "... nuisance finding provides a basis for the court's conclusion of appellant's liability for contamination ...", and affirmed.

*Biniek v. Exxon Mobil Corp.*, 818 A.P.2d 330 (N.J. 2002)

3. **Are due process rights violated if the property owner is forced to pay inordinate clean up costs for problems discovered after a taking when the property owner had no control over them?**

The district court refused to consider uncontradicted testimony that if Anda had discovered the contamination problem, he could have addressed it at a cost of \$150,000.00 or less, with 90% of the cost likely reimbursed from the Petroleum Fund, and found Anda strictly liable for the inordinate clean up costs incurred because of deadlines faced by the condemnor's private developer and its failure to first inspect the property.

*Aladdin v. Black Hawk County*, 562 N.W.2d 608 (Iowa 1997)

4. **Can a property owner be negligent when someone else emptied and abandoned an underground tank in 1972 or 1973 about one year after the property owner acquired his partial interest, when the property owner knew nothing of the tank, it was not leaking and the condemnor offered no evidence of a breach of any duty?**

The district court denied Anda's two motions for summary judgment and two motions for judgment as a matter of law letting negligence go the jury, and entered judgment on the jury's special verdict finding that Anda had been negligent and had created a nuisance. The court of appeals did not review the district court's refusal to grant the motions.

*Stinger v. Minnesota Vikings*, 705 N.W.2d 746 (Minn. 2005)

*Smith v. Knowles*, 281 N.W.2d 653 (Minn. 1979)

*Seaton v. County of Scott*, 404 N.W.2d 396 (Minn. 1987)

5. **Can a property owner be liable for a nuisance without negligence or wrongdoing when the jury instruction on nuisance required negligence or wrongdoing?**

The district court entered judgment based on the jury's finding of nuisance when the jury instruction required an underlying finding of negligence or wrongdoing. The court of appeals affirmed; recognizing that a nuisance may involve "negligent or intentional conduct, ultra hazardous activity, violation of a statute, or other tortuous activity", and that the conduct must be "wrongful in the sense that the defendant can be said to be at fault", and that there is an "element of intent"; and found that the jury's nuisance finding provides a basis for the "... court's conclusion of appellant's liability for contamination ...".

Jury instruction on wrongful nuisance, Add. Tab No. 10

6. **Should the jury have compared the negligence of the condemnor's private developer with any negligence of a property owner, when the property owner plead comparative fault and requested a jury instruction and special verdict on it?**

The district court ruled in a sidebar that the condemnor owed no duty to Anda, there would be no comparative fault determination,

and if Anda did not like it, he could appeal. The court of appeals held that because the jury's nuisance finding provided a basis for liability, it did not need to address Anda's request for a comparative fault instruction.

Minn. Stat. § 604.01

State ex rel. Southwell v. Chamberland, 361 N.W.2d 814 (Minn. 1985)

McKay's Family Dodge v. Hard Drives, Inc., 480 N.W.2d 141 (Minn. App. 1992)

7. **Should the district court have granted a property owner's motions for summary judgment and motions for judgment as a matter of law arguing the property owner was not liable for clean up costs?**

The district court denied the motions, let negligence go to the jury and later found Anda strictly liable as a matter of law, based on the jury's negligence finding and the district court's additional findings. The court of appeals did not renew the district court's refusal to grant the motions.

Stinger v. Minnesota Vikings, 705 N.W.2d 746 (Minn. 2005)

Kidwell v. Sybaritic Inc., 749 N.W.2d 855 (Minn. App. 2008)

8. **Is a party denied a fair jury trial when a district court makes scores of sua sponte objections to a party's opening statement, examination of witnesses and closing arguments, and misstates a party's burden of proof during his examination of an expert?**

The district court, denied the motion for new trial stating generally that the district court was not biased, but did not consider the specific admonition against interrupting the examination of witnesses in the General Rules of Practice. The court of appeals held that it would not disturb the district court's decision on a motion for new trial absent an abuse of discretion.

Rule 2.02 of the General Rules of Practice for the District Courts

Hansen v. St. Paul City Ry. Co., 43 N.W.2d 260 (Minn. 1950)

## **II. STATEMENT OF THE CASE AND THE FACTS**

### **A. The Courts Below, The Nature Of The Case And Its Disposition**

This appeal is from judgments entered after a jury trial in the district court for Clay County, Minnesota, the Honorable Steven J. Cahill presiding, App. Tab No.'s 21-22, and from the district court's order denying the Appellant, Roger W. Anda's ("Anda") motion for a new trial. Add. Tab No. 6. The court of appeals, Judges Klaphake, Worke and Peterson affirmed by an unpublished decision, Add. Tab No. 1.

After Anda appealed a quick take condemnation award for Holiday Office Park ("HOP"), Add. Tab No. 3, the Respondent, Moorhead Economic Development Authority ("MEDA") brought a separate action against Anda to recover damages for contamination found on adjacent properties, App. Tab No. 5. The condemnation appeal and the damages action were consolidated.

The district court entered judgment finding that Anda would receive nothing for HOP, App. Tab No. 22, after the condemnation commissioners had awarded \$488,750.00, App. Tab No. 2, knowing of contamination, and the jury \$455,000.00, assuming no contamination, App. Tab. No. 17, because of contamination found on adjacent properties after the taking, and entered judgment against Anda for \$483,489.07 for clean up costs, App. Tab No. 21.

### **B. Summary**

Thou shall not steal. Eighth Commandment, the Bible.

Property shall not be taken without "just compensation". Fifth Amendment, United States Constitution, Articles I, § 13, and XIII, § 4, Minnesota Constitution.

The uncompensated quick take of a recently updated \$2,000,000.00 income producing office building the owner never intended to sell and a judgment to pay \$474,512.00 in clean up costs for problems only made evident because of the taking, when the owner did not always have exclusive control over the building, knew nothing of the fuel oil tank on the property that had been emptied and abandoned with no sign of leaking in 1972 or 1973; is an injustice no tradition of fairness or justice can let stand, no matter the record or circumstances. No government of the people, by the people and for the people would force this result, even if it could. MEDA needs to play fair, pay fair and pay for its own mistakes.

**C. Statement Of The Facts Relevant To The Grounds Urged For Reversal**

**1. HOP's history, heat source, style, Anda's ownership (25% until 1996), improvements, and value.**

HOP was built in 1964, Tr. P. 1125, as a commercial office building next to Interstate 94 in Moorhead, Minnesota, Tr. P. 1112. HOP was heated by natural gas, Tr. PP. 488-489 with backup fuel oil supplied by an underground 550-gallon tank, Tr. P. 560, to obtain cheaper gas, Tr. P. 488. HOP was an elevated steel, concrete and glass building with ground level parking. Add. Tab. No. 7. Anda watched HOP being built, Tr. P. 1125, knew the builder was one in the best contractors in the area, Tr. PP. 1108 and 1125, and was proud to obtain a 25%

minority interest in HOP in 1971, Tr. P. 486, which he held as late as 1995, Tr. P. 497 or 1996, App. P. 157. It was not until 1995, that Anda became the sole owner of HOP, Tr. P. 497. Soon thereafter he borrowed \$125,000.00 to fix it up, Tr. PP. 980, 1110-1111, and put a new twenty-year roof on it. App. Tab No. 28 and Tr. P. 1119. He had no intention of ever selling HOP. Tr. PP. 1113 and 1122. He doesn't sell anything. Tr. PP. 1113 and 1120. Anda had insured HOP for \$865,300.00, App. Tab No. 29 and Tr. P. 1059, and the cost to replicate HOP, in the opinion of one of MEDA's blight experts, would have been \$1,950,800.00. App. P. 149. Anda would not have sold it for \$2,000,000.00. Tr. PP. 987-988 and 1120.

**2. The fuel oil tank, its use and abandonment in 1972 or 1973.**

The 550-gallon underground fuel oil tank was installed when HOP was built in 1964. HOP had a small mechanical room on the open ground level parking lot that contained the backup fuel oil furnace. A 1½" thick vent pipe ran from the tank up the outside of the mechanical room, Tr. P. 460, over six feet, Tr. PP. 308 and 457, which pipe was clearly visible from off the property. Tr. PP. 307-309, 311, 457 and 460. See App. Tab No. 31 for a diagram.

One 80-year-old witness, Tr. P. 872, who had been at the HOP open house, Tr. PP. 873-874, and was a tenant at HOP continuously from then until the taking, Tr. PP. 875-877, testified that to her knowledge, Anda knew nothing of fuel oil at HOP. Tr. PP. 882-883.

Monty Kjos was a tenant of HOP from 1967, Tr. PP. 506 and 513, until the taking, Tr. PP. 502, 506-507, and begin to manage HOP for its owners in 1972. Tr. P. 492. He testified that he never used fuel oil at HOP, Tr. PP. 488, 500-501 and 510, and never used the switch to burn fuel oil, instead of natural gas. Tr. P. 500. Mr. Kjos decided that having fuel oil was not worth the savings for off-peak gas. Tr. P. 498.

Ole Kjonaas worked for Mattson Oil Company ("Mattson") from 1963 until 1997. Tr. P. 516. During 1972 or 1973 he emptied the HOP tank, Tr. P. 521, so only two gallons of fuel oil remained. Tr. PP. 522-523. Mr. Kjonaas testified that there was no sign of trouble with the tank, it was not leaking at the time, Tr. PP. 523 and 526, and that he took the fuel oil from the tank back to Matson where it burned it in its own furnace, with no problems. Tr. PP. 527-528. Mr. Kjonaas testified that if the HOP tank had been leaking, there would have been water in it, Tr. P. 523, and that the fuel oil was not contaminated. Tr. P. 523. He testified that he had serviced approximately 50 underground fuel oil tanks in Moorhead, Tr. P. 528, and had experience with approximately 30 leaking tanks. Tr. P. 526. After Mr. Kjonaas emptied the tank, it was never used again. Heating oil tanks under 11,000 gallons need no permit, are not regulated and need not be reported to the Minnesota Pollution Control Agency ("MPCA"). Tr. P. 1022.

**3. HOP after the tank was emptied and abandoned in 1972 or 1973, and Anda's ignorance of it.**

HOP served as an income producing commercial office building until just before the taking. Never did any fuel oil contamination become apparent at HOP until after the condemnation. Tr. PP. 512-513. Since HOP had no basement, and was built on stilts, over a blacktopped parking lot, contaminated soil under the lot would not be noticed, no matter the source. Add. Tab. No. 7. The Moorhead Fire Department and Moorhead Sanitation Department did periodic inspections of HOP and never noticed a problem. Tr. PP. 510, 512-513. Anda knew nothing of the underground fuel oil tank at HOP nor any fuel oil use at HOP. Tr. PP. 1111, 1113, 1115, 1127, 1133, 1138-1139. No one ever did anything to hide the tank. Anda was surprised and shocked to learn of the tank and could not believe it. Tr. PP. 1126, 1140-1141.

**4. The redevelopment, taking, surprising discovery of contamination, and the developer agreement.**

On March 30, 2001, MEDA entered into a Development Assistance Agreement with Moorhead Holiday Associates (“MHA”), App. P. 17, a private developer, to redevelop 24 acres. Tr. P. 385. MHA was managed by Wayne Bradley, a former CPA for 25 years, Tr. P. 318, who left accounting, Tr. PP. 372-373, to go into development work with one of his largest accounting clients, Tr. PP. 379 and 388, the trust that owned MHA. Tr. P. 376. Mr. Bradley had no municipal development experience. Tr. PP. 380-381.

MHA purchased all but HOP and one other property. Tr. PP. 356-357. The plan was to develop a Courtyard by Marriott that would anchor further

development. Anda refused MHA's offer to pay \$600,000.00 for HOP. Tr. PP. 384-385 and 466. So MEDA used a quick take condemnation to take HOP for MHA.

MEDA took title to HOP on June 29, 2001, and possession on July 2, 2001. App. P. 3. Not until August 7, 2001, when it finally started digging did MHA discover contamination under the HOP parking lot. Tr. P. 122. MEDA transferred title to MHA two days later. App. Tab No. 33.

MHA did not check HOP for underground environmental problems before the condemnation, Tr. PP. 324 and 584, as it had checked for asbestos, Tr. P. 291, even though it had the right. Minn. Stat. § 117.041, Add. Tab No. 11. Mr. Bradley admitted MHA should have checked. Tr. PP. 324-325. Mr. Bradley had visited HOP a number of times, Tr. P. 341, when he had an accounting client there. Tr. P. 324.

The 8" fill cap was still visible. Tr. P. 287. The vent pipe and fuel oil furnace were there to the end. Tr. PP. 287-288.

MHA entered into a developer agreement with Moorhead Hospitality Limited Partnership ("Moorhead Hospitality") to build the Courtyard by Marriott. Add. Tab No. 8.

The agreement included a "clean site" term and required delivery on August 1, 2001. Add. P. 52.

Moorhead Hospitality extended the delivery date "a couple of weeks" to August 14, 2001. Tr. PP. 397-398.

**5. Other possible sources of the contamination.**

“Slightly over a thousand gallons” of fuel oil allegedly could have caused the contamination at HOP. Tr. PP. 661-662. HOP may have used fuel oil from 1964, but not after Mr. Kjos became involved in 1967. He never paid a fuel oil bill, Tr. P. 508, never ordered any fuel oil for HOP, Tr. P. 510, and never saw anyone fill the tank. Tr. P. 510. Although Mr. Kjonaas testified that the tank had been on a keep full system, Tr. PP. 518-519, he gave no testimony about delivering any particular number of gallons of fuel to HOP at any particular time. There is no accounting for “slightly over a thousand gallons”, let alone any missing fuel oil from the HOP tank. The tank was not leaking. Tr. PP. 526-528.

Anda became certain that the fuel oil contamination under HOP had come from another underground fuel oil tank once used to heat a swimming pool addition to a Holiday Inn Hotel immediately east of HOP, later renamed the Regency Inn, donated to Concordia College, Tr. P. 462, and torn down. Mr. Kjonaas had heard “talk” about a tank there. Tr. P. 520.

Anda’s private investigator was kicked out of Moorhead City Hall while reviewing public records, Tr. P. 893, and after he discovered the Holiday Inn never got a building permit for the pool addition, Tr. P. 895, and before he could look at blue prints. Tr. PP. 895, 896 and 708. The Holiday Inn tank was shown on blue prints, Tr. PP. 301 and 351, seen by three other people. All witnesses and experts testified that underground leaks in the HOP redevelopment migrated either to the west, Tr. P. 409, or towards the north. Tr. P. 575. The contaminated area

identified after the condemnation was consistent with a leak from a tank east of HOP spreading and migrating west under HOP. App. Tab No. 26. 28.4% of the clean up cost was for the former Holiday Inn property. Tr. P. 673. The HOP tank, installed new in 1964, and emptied and abandoned in 1972 or 1973, with no sign of leaking, simply got in the way.

**6. The hasty and inordinately expensive 7- day clean up.**

So, MHA had from August 9, 2001, until August 14, 2001, to address the contamination and was in a hurry to get the Marriott started. Tr. P. 614. There would have been plenty of room to build the Marriott on clean ground within the redevelopment area. Tr. PP. 463, 903-904.

MHA reported the problem to the MPCA, Tr. P. 1018, which determined that MEDA, because of its former ownership interest in HOP, would be a responsible party for clean up liability. Tr. P. 1035. The MPCA never determined Anda would be a responsible party. Tr. P. 1055.

MHA, with no bidding, Tr. P. 396, contracted to excavate and haul 10,300 cubic yards of contaminated dirt about 80 miles away. Tr. PP. 349, 1026 and 1029. MHA did not know how to negotiate the contract, Tr. P. 400. A dispute arose about whether the price would be based on cubic yards of dirt in place, or cubic yards dumped from the trucks, after its volume expanded by 40% to 50%. Tr. P. 790.

MHA suffered a \$687,775.00 arbitration award. Tr. PP. 405-406. Had it known how to negotiate the contract, there would have been grant money to pay

for the entire clean up. Tr. P. 417. Anda was consulted about none of this. Tr. PP. 996 and 1139.

**7. Alternative much less expensive cleanup methods.**

Witnesses from the MPCA and MEDA's own witnesses testified that if Anda had kept HOP, and the underground contamination had become apparent, regardless of the source, he could have reported the problem to the MPCA and addressed the problem with monitoring and limited dirt removal in the immediate area of the tank. Tr. P. 598. Anda could still have continued to operate HOP. Tr. P. 605. The total cost to do this would have been \$100,000.00 to \$150,000.00, Tr. P. 615, where 90% of the cost likely would have been paid from the Minnesota Petroleum Fund, Tr. PP. 604-605. No ground water or wells were involved, Tr. PP. 630-631, and no problems had become apparent on adjacent properties.

**8. The motions for summary judgment and motions for judgment as a matter of law.**

Before the trial, Anda made two motions for summary judgment arguing that since he knew nothing of a tank emptied and abandoned in 1972 or 1973, he could not be negligent, and that since he was not in exclusive control of HOP, he could not be strictly liable.

MEDA did nothing to learn anything about who installed the tank, how it was maintained, who manufactured the tank, or who actually used the tank. Tr. PP. 693-694. MEDA did nothing to identify other owners of HOP, Tr. P. 361, who might also be liable without fault, if strict liability applied.

During the trial, Anda made two motions for a judgment as a matter of law, Tr. PP. 904 and 1149-1150, for the same reasons but also because MEDA presented no trial evidence about any breach of any particular duty or standard of care. Nuisance and negligence should not have gone to the jury.

**9. The trial.**

The district court interrupted Anda's opening statement, examination of witnesses and closing argument about 100 times. The more serious interruptions are summarized and copied from the trial transcript and made part of the supplemental record filed with the court of appeals. See App. Tab No. 37 for the index. One informed the jury that Anda could not cross-examine about other sources of contamination unless Anda had proof of another source. App. PP. 250-251. Another during closing limited Anda's argument of fair value based on insurance coverage, because, said the court, there was no evidence about coverage being limited by appraisals. App. PP. 261-262. Anda himself had presented that uncontradicted evidence. App. P. 260.

The district court ruled in several sidebars that MEDA would have to prove negligence, and that there would be no strict liability. Tr. PP. 766 and 906-907. The district court ultimately imposed strict liability, Add. P. 24, making its own necessary findings, Add. P. 23 Nos. 12-13, with no instruction nor special verdict on strict liability, even though MEDA conceded that the jury needed to make findings to support strict liability. App. Tab No. 13.

The district court ruled that MEDA owed no duty to Anda, App. 174, and thus its negligence [actually that of its agent, MHA, a private developer] would not be compared with any negligence of Anda, and if Anda did not like it, he could appeal. App. P.174.

The district court broke its hard fought promise to Anda to instruct the jury to find “value”, App. P. 191, L. 3, but instead instructed it to find “fair market value”. App. P. 225, L. 16. It rejected most of Anda’s negligence jury instructions.

On the penultimate day of trial, MEDA voluntarily dismissed its nuisance claim. On the last day of trial, MEDA voluntarily dismissed its trespass claim, App. PP. 65 and 176, but over Anda’s objections, reinstated its nuisance claim, App. P. 177, saying that it had made a mistake. According to the court of appeals, the jury’s nuisance finding was a proper basis for the district court’s “... conclusion of appellant’s liability for contamination...”. Add. P. 4.

### **III. ARGUMENT**

#### **A. Standard Of Review**

Issues 1 and 3 are legal issues of statewide impact, likely to recur and call for the application of a new principle; reviewable de novo.

Issues 2, 5 and 6 are legal issues reviewable de novo.

Issues 4 and 7 were first raised by two motions for summary judgment and two motions for judgment as a matter of law. The district court’s refusal to grant the summary judgment motions is reviewable on appeal as a matter of law. The

presence of a duty is a question of law reviewable de novo. Negligence should not have gone to the jury. The district court's decision denying the motions for judgment as a matter of law is a question of law reviewable de novo. *Thompson v. Hughart*, 664 N.W.2d 372 (Minn. App. 2003).

Issue 8 is reviewed for an abuse of discretion, but the interpretation of the General Rules of Practice, is a question of law.

**B. In A Quick Take Eminent Domain Action, The Fair Value Paid For Property Must Be Determined At The Time Of The Taking, And Cannot Be Reduced For Contamination Discovered As A Result Of And After A Taking**

**1. The Statute.**

The district court and court of appeals recognized that no cases in Minnesota squarely address this issue. Add. PP. 3 and 20. MEDA took possession pursuant to Minn. Stat. § 117.042 providing for quick take rights. Add. P. 63. That section allows a taking after a 90-day notice if the petitioner pays the owner, or deposits with the court, an amount equal to the "petitioner's approved appraisal of value". "In all other cases, the petitioner has the right to title and possession after the filing of the award by the court appointed commissioners [if] appeal is waived [or] three-fourths of [the commissioners'] award [is] ... deposited by the court administrator". Thus, in a non-quick take condemnation, it is correct to say, as the court of appeals did, Add. P. 2, that generally valuation is determined at the time of the commissioners' award, because that is the earliest time the petitioner has the right to title and possession of the property.

But in a quick take condemnation the petitioner can take title and possession as soon as it pays to the owner or deposits with the court an amount equal to its “approved appraisal of value”. MEDA’s approved appraised value for HOP was \$500,000.00, App. P. 2, which it deposited with the court, and then took title and possession, App. P. 4. Not until over twenty months later did the condemnation commissioners finally make their award. App. Tab No. 2. Along the way Anda had to obtain a court order to obtain three-fourths of the \$500,000.00 after his appeal required by Minn. Stat. § 117.155. App. Tab. No. 4.

Thus, the general rule should be that valuation is determined at the time of taking, which, in a quick take condemnation is the time the condemnor takes title and possession after making the payment or deposit and which, in a non-quick take condemnation is a time “after the filing of the award by the court appointed commissioners”.

If a petitioner is concerned about potential environmental issues, it can use Minn. Stat. § 117.041, Add. P. 59, to inspect the property before the taking.

## **2. The Case Law.**

The cases cited by the district court and the court of appeals to say valuation is done as of the time of the commissioners’ award, is the same as saying that valuation is done at the time as the taking, because in a non-quick take condemnation, the taking and the commissioners’ award must occur at the same time. If valuation occurs at the same time as the taking in a regular condemnation proceeding, the same rule applied to a quick take condemnation produces the rule

that valuation in a quick take condemnation must be done at the time of taking. Any other rule leads to the asymmetric and unfair result that in a quick take condemnation, the petitioner can take the property after a 90-day notice, deposit something with the court, use the property, find problems with it, and then years later argue for a reduced or no award from the commissioners where the property owner could never benefit from project enhancements or beneficial things found on the property, after the taking.

It has been the general rule in Minnesota that damages in condemnation are measured by the value at the date of taking. Twin Cities Metropolitan Public Transit Area v. Twin City Lines, Inc., 301 Minn. 386, 224 N.W.2d 121, 128 (1974). A taking is every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property. MSA § 117.025.

In City of St. Louis Park v. Almor Co., 313 N.W.2d 606, 609-10 (Minn. 1981), the court affirmed that the established rule in Minnesota is that condemnation damages are assessed as of the date of the commissioners' award. But, it is now commonly the date of the quick-take under the statute, because most condemnors use a quick-take procedure. See Date of Valuation and Governing Assumptions, 25 Minn. Prac., Real Estate Law § 10.20 (2007 Ed.); MSA § 117.042 (Authorizing quick-takes).

On June 29, 2001, the district court ordered that MEDA would take possession of HOP on July 2, 2001. App. P. 3. Thus value should be determined then, which the jury did as of June 29, 2001, for \$455,000.00. App. Tab No. 17.

As MEDA's appraiser said, HOP did not lose its value until "... the moment that the public [became] aware there was contamination at the property." App. P. 254.

When the Government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a taking in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. *Brooks Investment Company v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975). The *Brooks* court held that the valuation of the property is measured by the date the condemnor enters on the property. See also 26 Am. Jur. 2d EMINENT DOMAIN § 115.

Cases from other jurisdictions, or even from Minnesota before enactment of Minn. Stat. § 117.042 in 1971 are unpersuasive. Noteworthy, then, is *City of Minneapolis v. Hennepin County*, 391 N.W.2d 853, 856 (Minn. 1986), where the court, in discussing the quick-take provisions, noted that by statute, damages awarded by court-appointed commissioners bear interest from the earlier of the filing of the commissioner's report or the date on which the condemnor takes possession. Minn. Stat. § 117.195 (1974). It would not make sense for a property owner to receive interest from the time the condemnor takes possession, but only receive compensation as of the date of the commissioner's filing of their report, as advocated by MEDA. The quick take provisions are clear that it is when the condemnor takes possession that the taking occurs. The problem in valuing property taken under the quick take section is that possession and title can pass within 90-days, but there is no statutory requirement about when the

condemnation commissioners are actually required to make their award. Here, the award came over twenty months after the taking.

Allowing a quick take contamination award to be reduced by conditions on the property found after the taking puts risk of loss beyond the control of the landowner and provides no incentive for the condemnor to carefully evaluate the property before it takes it. The rule that a property owner is not entitled to an increased award based on the improvements that will supposedly come as a result of the contamination, *Regents of the University of Minnesota v. Hibbing*, 225 N.W. 2d 810 (Minn. 1975), is best balanced by a rule that the property owner cannot suffer a decreased award for problems revealed by the condemnation.

### **3. The Valuation Special Verdict.**

The district court, over Anda's objections, App. PP. 199-201, submitted a special verdict to the jury requiring it to determine the fair market value of HOP on June 29, 2001, if it had not been impaired by fuel oil contamination, but also its fair market value "Taking into account the fuel oil contamination". App. P. 90. Anda had proposed a special verdict asking the jury to determine "What amount of money will justly, fairly and equitably compensate Roger Anda because of the [MEDA's] taking of [HOP] from him. App. P. 57.

Anda had objected to the term "fair market value" in the district court's special verdict, App. P. 178, warning that there might be reversible error if there were any departure from the language of the Constitutions. App. P. 188.

**C. A Property Owner, Not In Exclusive Control Of Property, Cannot Be Held Strictly Liable As A Matter Of Law For Latent Environmental Problems Discovered After A Taking**

Anda had only a 25% interest in HOP as late as 1995. Tr. P. 497. He was a minority owner when the tank was emptied and abandoned without incident in 1972 or 1973. Tr. PP. 486, 1110 and 1127.

If liability is based on simple ownership, without fault, then all of the former owners of HOP should be responsible, including MEDA which owned HOP from June 29, 2001, App. P. 2, until August 9, 2001, App. Tab No. 33, two days after the contamination was discovered. Tr. P. 122.

As MEDA conceded and argued, even where there is strict liability, a jury must make factual determinations to support strict liability. App. PP. 221-222 and App. Tab No. 13. Those proposed findings never went to the jury but the district court made two of them for MEDA later on its own. App. P. 71 (3 and 4) and App. P. 23 (12 and 13). This after the district court had instructed the jury that "You and only you can decide the facts." App. P. 75. Anda argued that strict liability was inapplicable, and should not go to the jury. App. PP. 59 and 63.

There is nothing ultra hazardous about using a 550-gallon fuel oil tank. Even today, one needs no permit to install a 550-gallon back up fuel oil tank. Such tanks are not regulated by the MPCA. Tr. P. 1022.

The district court had said several times that there would be no strict liability and that MEDA would need to prove negligence. Tr. PP. 766 and 906.

The district court's rulings said as much. It gave MEDA "... an opportunity to conduct discovery to test respondents' denials of negligence". Add. P. 7. It speculated that the jury could infer that fuel oil was "consumed" in some fashion in 1972 or 1973, while Anda was an owner of the property. Add. P. 29. Thus, the district court was still looking for some fault basis of liability, even after the trial.

*Biniek v. Exxon Mobil Corp.*, 818 A.2d 330, 338, 358 N.J.Super., 587 (2002) notes "The majority of jurisdictions deciding this issue have held that gasoline storage and transport is not an ultra hazardous activity deserving of strict liability". The *Biniek* court held that strict liability is reserved for abnormally dangerous activity to impose liability on those who, despite social utility, introduce an extraordinary risk of harm into the community for their own benefit. at 336. The court adopted the principles set forth in Restatement of Torts, 2d:

- (a) Existence of a high degree of risk of harm to the person, land, or chattels of others;
- (b) Likelihood that great harm would result therefrom;
- (c) The inability to eliminate those risks through the exercise of reasonable care;
- (d) The common usage of the activity;
- (e) The appropriateness of the activity; and
- (f) The value of the activity to the community.

Restatement (Second) of Torts, § 520 (1977). Id. at 337.

The *Biniek* court stated that "in the instant matter, the overwhelming strength of authority and a common sense application of the Restatement mandate the conclusion that storage and transportation of gasoline does not qualify as an

ultra hazardous activity. *Id.* at 338. Any dangers posed by gasoline storage or transportation can thus be eliminated through the exercise of reasonable care.

Activities found to be ultra hazardous include such things as blasting in a thickly populated area, fumigating a restaurant with deadly poison or using a blowtorch on a waste oil tanker ship. (6 Witkin Summary of Cal. Law (9th ed. 1988) Torts, § 1232-1236, pp. 668, 670.) Ultra hazardous activity has been distinguished from activity causing a nuisance by the fact that ultra hazardous activity is not unlawful and cannot be abated. (6 Witkin, *supra*, Torts, § 1228, p. 663). As noted by several jurisdictions, underground fuel storage can be abated, and therefore it is clearly not an ultra hazardous activity, and strict liability is not appropriate.

Additional jurisdictions have held that pollution from underground storage tanks did not result in the imposition of strict liability, because storage in the underground tanks did not constitute abnormally dangerous or ultra hazardous activities under the circumstances. See *Arlington Forest Assoc. v. Exxon Corp.*, 774 F. Supp. 387 (E.D. Va. 1991); *Snyder v. Jessie*, 164 App.Div.2d 405, 565 NYS.2d 924 (4th Dept. 1990) (The court concluded that the storage and delivery of home heating oil does not constitute an ultra hazardous activity, even when 1,000 gallons of fuel oil leaked, escaped, or was released or discharged from a storage tank in the span of two months and migrated into the local groundwater and lands, including the Plaintiff's nearby property); *Hudson v. Peavey Oil Co.*, 566 P.2d 175 (Or. 1977) (Where the court found that the leakage of gasoline from

one of an oil company's underground storage tanks onto the Plaintiff's property did not justify a jury instruction holding the oil company strictly liable for any damages because the evidence did not justify a determination that it was caused by an abnormally dangerous activity. The court added the principal factor in the activity within the abnormally dangerous classification is the creation of an additional risk to others that cannot be alleviated and that arises from the extraordinary, exceptional, or abnormal nature of the activity.); *Grube v. Daun*, 570 N.W.2d 851 (Wis. 1997) (Farmers installation and use of underground storage tank on farm in the 1970's, without more, was not abnormally dangerous activity that required imposition of strict liability when gasoline leaked from tank ultimately resulted in groundwater contamination.)

In *Mahowald v. Minnesota Gas Company*, 344 N.W.2d 856, 860-861 (Minn. 1984), homeowners brought an action against a gas company and others for an explosion of their home as a result of a leak in a natural gas main pipe owned by the gas company, and the court rejected the homeowner's request for an instruction that the gas company was strictly liable. The Court rejected application of Sections 519 and 520 of the Restatement (Second) of Torts. *Id.* The Court noted that its research and the research of other courts had not found any other case where strict liability was applied under the Restatement (Second) of Torts against a gas distributor under similar circumstances. *Id.* at 861. The Court rejects the strict liability argument of others to impose liability without proof of negligence. *Id.* at 860. A close examination of strict liability cases, including

*Berger v. Minneapolis Gaslight Co.*, 62 N.W. 336 (Minn. 1895), *Cahill v. Eastman*, 18 Minn. 324 (Gil.292) (1871), *Wiltse v. City of Redwing*, 99 Minn. 225, 109 N.W. 114 (1906), and *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) clearly shows that the instrumentality causing the harm was under the exclusive control of the party charged. *Id.* The testimony throughout this case was that the HOP tank was not exclusively in Anda's control. The *Mahowald* court's analysis of determining whether something is an abnormally dangerous activity favors the position of doing so on a case by case basis, rather than a blanket rule. See *Id.* at 861.

Anda requests that Minnesota join the majority of jurisdictions in holding that gasoline storage or merely owning a fuel oil tank is not an ultrahazardous activity deserving of strict liability, particularly with the instant facts where Anda was not in exclusive control of the fuel tank and no ground water contamination occurred. The facts of the present action are distinguishable from the rule in *Rylands* and Minnesota ought to evolve *Rylands* to modern day activity.

The rule that there should be no strict liability for gasoline storage and transport is especially applicable to fuel oil storage since, as the MPCA testified, "... gasoline is more volatile and, in general, more vapors could be expected from it." and "... it's generally understood that gasoline is more likely to explode than heating oil." and "It's more difficult to light fuel oil than it is to light gasoline." Tr. PP. 1040 and 1041.

**D. A Property Owner's Due Process Rights Are Violated If A Property Owner Is Required To Pay Inordinate Clean Up Costs For Problems Discovered After A Taking When The Property Owner Had No Control Over Them**

MEDA took a \$2,000,000.00 income producing office building. But as important, it also took Anda's ability to calmly and inexpensively address any environmental problems, if they had ever become apparent. Anda started to examine a MEDA witness about this but the district court interrupted saying "That's irrelevant," "The Holiday Office Park was condemned ... the issue is the value of the property ... we are not going there, counsel", and despite a sidebar, stopped the examination. App. P. 245.

Liability for environmental claims is addressed by Minnesota Statutes Chapters 115B and 116. They require detailed due process safeguards and limit who can be a responsible party, where liability can even be imposed, and supercede strict liability for environmental claims. Anda cited some of these statutes in rejected jury instructions. App. PP. 30 and 41.

Without the taking, Anda could have calmly and inexpensively addressed any, contamination for \$100,000.00 to \$150,000.00, 90% of which would likely have been reimbursed by the petroleum fund with no need to frantically haul away 10,300 cubic yards of contaminated soil in seven days on a contract with no bids and ignorantly negotiated. He might even have been able to determine the true source of the contamination before everything was hauled away.

Anda tried to better develop the argument that cheaper clean up alternatives were available, and he should not have lost his right to pursue them. This was part of the argument made throughout the trial that valuation of HOP should have been done as of the date of the taking, in which case clean up costs would have been irrelevant, because the contamination was discovered after the taking, and should not have affected the value at the time of taking.

Both the Illinois Supreme Court and the Iowa Supreme Court have held that evidence of environmental contamination is not admissible in a condemnation proceeding. Illinois led the way in *Department of Transportation v. Parr*, 633 N.E.2d 19 (Ill. Ct. App. 1994). In *Parr*, the Illinois DOT condemned Parr's property and valued the property first at a negative \$100,000.00 and then zero due to alleged contamination. DOT sought to admit the clean up costs as evidence at trial arguing that remediation costs "are a factor adversely affecting the property's value. *Id.* at 21. The district court rejected the evidence and the Illinois Court of Appeals affirmed holding: (1) evidence of such costs would deprive the property owner of the procedural safeguards, rights and defenses under the state statutes and that admission of such evidence would permit DOT to circumvent the legislative procedures, (2) the environmental act was better suited than the condemnation statute to handle environmental issues, and (3) the constitutional rights of the landowners are paramount over the condemnor's interest in determining market value and that condemnors must resort to legislative

procedures outside the context of eminent domain proceedings when addressing remediation costs. *Id.* at 22, 23.

After *Parr*, the Iowa Supreme Court reached the same conclusion. In *Aladdin v. Black Hawk County*, 562 N.W.2d 608 (Iowa 1997), Black Hawk County condemned Aladdin's property which had been used as a laundry business. The condemnation commission offset the value of the property by the cost of environmental remediation. *Id.* at 610-11. The district court reversed the commissions' decision and the Iowa Supreme Court affirmed the district court. The Iowa Supreme Court's concluded:

1. Iowa's Environmental Statute governed the proper procedure for the recovery of environmental remediation costs. In an environmental remediation case, the owner is entitled to present defenses and those defenses are not available in the condemnation proceeding;
2. Public Policy supported the exclusion of such evidence; and
3. The determination of environmental clean-up costs by the judge, commission or jury would be speculative.

*Id.* The same reasoning requires valuation of HOP with no regard for contamination discovered after the taking.

**E. A Property Owner Cannot Be Negligent When Someone Else Emptied And Abandoned An Underground Tank In 1972 Or 1973 About One Year After The Property Owner Acquired His Partial Interest When The Property Owner Knew Nothing Of The Tank, It Had Not Been Leaking And There Was No Showing Of Negligence**

Anda knew nothing of the tank, and could not have foreseen trouble almost 30 years later.

For there to be negligence, there must a duty, a breach of the duty, proximate cause and damages. Anda argued for a simple and complete jury instruction on negligence, App. P. 32, never got it, App. P. 82, and steadfastly preserved his objections. App. Tab. Nos. 9-10 and 12 and pages 210 to 213 and stood on those objections, App. P. 218 and 221.

MEDA offered no evidence of a standard of care in 1972 or 1973 concerning underground tanks. As one of MEDA's witnesses testified, pollution in the 1960's meant throwing candy wrappers on the ground. Tr. P. 858.

The burden was on MEDA to prove a standard of care, and a breach of that standard of care. It failed, and thus there is no negligence. The presence of a duty is a question of law reviewable de novo. *Stringer v. Minnesota Vikings*, 705 N.W.2d 746 (Minn. 2005).

In *Cooper v. Whiting Oil Co.*, 311 S.E.2d 757 (Va. 1984) the Court upheld summary judgment granted in favor of defendant oil company Whiting in an action for alleged negligent use of a gasoline storage tank. The Court stated that the burden rested on the landowners to prove by a preponderance of the evidence that Whiting was negligent and that its negligence was a proximate cause of the property damages alleged. *Id.* at 495. The Court held that since the landowners did not show, by trade practice or otherwise, what duties Whiting had as to inspection and maintenance of the gasoline tank, they failed to prove that Whiting was negligent before it received notice of the leak. *Id.* at 496.

In Smith v. Knowles, 281 N.W.2d 653 (Minn. 1979) the Minnesota Supreme Court upheld the trial court's dismissal of a plaintiff's claims after the close of the plaintiff's case in a medical malpractice claim because the plaintiff did not offer sufficient proof of the standard of care. The Court stated that to establish a prima facie case in an action such as this, the plaintiff must introduce expert testimony as to both the standard of care and the defendant doctor's departure from that standard. Id. at 655. The Court went on to state that "Moreover, plaintiff's claims required expert testimony to show that Dr. Knowles' action or inaction was a direct cause of the decedents' deaths." Id.

One of MEDA's experts testified that in the mid to late 1980's tolerance on tanks got more strict. Tr. P. 858. Another said this occurred in the late 1970's and early 1980's. Tr. P. 599. But never did MEDA produce any evidence that in 1972 or 1973 a property owner had a duty to do more than empty a tank where there was no sign of leaking. Even today a 550 back up fuel oil tank does not need to be registered with the MPCA. Tr. P. 1022.

In Seaton v. County of Scott, 404 N.W.2d 396 (Minn. 1987), the Court upheld a judgment granting a directed verdict for the County in a negligence action brought by a pedestrian who fell from a bridge constructed and maintained by the county. The district court had granted the directed verdict on the negligence claim on the grounds that the plaintiff had produced no evidence to establish a standard of care on the part of the county. In upholding the directed verdict the Minnesota Supreme Court held:

Even if one assumed a duty of care on the part of the County, Seaton failed to introduce any evidence to show the County breached the duty. Seaton's complaint alleged negligent design of the road and bridge. In order to create a jury question Seaton must show that the County deviated from the usual standard of care. *Id.* at 399 (emphasis added).

**F. A Property Owner Cannot Be Liable For A Nuisance Without Negligence Or Wrongdoing, When The Jury Instruction Required A Finding Of Negligence Or Wrongdoing**

The court of appeals recognized that nuisance requires something more than simple ownership of property. There must be some tortuous activity, fault, and some element of intent. Add. P. 4. No evidence of any of these things went to the jury.

The instruction on wrongful nuisance required either negligence or wrongful acts. Add, Tab No. 10. The district court described this as “negligent nuisance”. App. P. 215. The simple fact that Anda was a 25% owner of HOP from 1971 until the tank was emptied and abandoned, a year or two later is not negligence and not wrongful conduct.

Since Anda was not negligent and MEDA produced no evidence of the breach of any duty or standard of care, under the jury instruction on nuisance, Add. P. 58, there can be no wrongful nuisance because Anda was not negligent and did not act “in other ways to wrongfully create the nuisance.”

**G. The Jury Should Have Compared The Negligence Of MEDA's Private Developer With Any Negligence Of Anda As Plead And Requested In An Instruction And Special Verdict**

Anda plead comparative negligence as an affirmative defense, App. P. 24, requested a jury instruction on it, App. P. 46, and a special verdict that would have apportioned negligence, App. P. 55. The district court, discussing an evidentiary point, refused saying there would be no comparative negligence, and if Anda did not like it, he could appeal. App. P. 174.

The district court did not consider that MHA, MEDA's agent, was a private developer, not a governmental body, that assigned its clean up claims to MEDA. App. P. 56. Thus MEDA can have no greater rights than MHA. An assignee of a claim take no other or greater rights than the original assignor and cannot be in a better position than the assignor. State ex rel. Southwell v. Chamberland, 361 N.W.2d 814, 818 (Minn.1985); Marquette Appliances, Inc. v. Economy Food Plan, Inc., 97 N.W.2d 652, 655 (Minn. 1959); Delacy Investments Inc. v. Thurman, 693 N.W.2d 479, 484 (Minn. App. 2005) (*nemo dat qui non habet*-or, "no one may transfer more than he owns."). The negligence of MHA included attempting a 24 acre redevelopment where its manager, Wayne Bradley, had no comparable experience, and one of its members had ethical problems, App. P. 240, not noticing the vent pipe or the fuel oil furnace in the mechanical room hiding in plain sight before taking HOP, not bothering to test for environmental problems before taking HOP, entering into a clean site contract without checking the property, stalling digging until August 7, 2001, until there were only seven days left to deliver the clean site and not bidding or properly negotiating the contract to haul away the contaminated dirt.

When the Minnesota comparative fault statute applies to a case, use of a special verdict upon request of any party is required. See MSA § 604.01. Anda made the request. App. P. 55. It is reversible error to refuse to give an instruction on comparative fault, which Minnesota courts have liberally applied even to situations where other jurisdictions have refused such application, where there is sufficient evidence for the issue to go to the jury. McKay's Family Dodge v. Hard Drives, Inc., 480 N.W.2d 141, 147 (Minn. App. 1992).

MSA § 604.01 covers comparative fault. In Subdivision 1 it states that the court shall, when requested by any party, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering. Fault under the statute includes unreasonable failure to avoid an injury or to mitigate damages. MSA § 604.01, Subd. 1(a). Under Minnesota's comparative negligence statute, if there is evidence of conduct which, it believed by the jury, would constitute negligence or fault on the part of the person inquired about, fault or negligence of the party should be submitted to the jury even though that person is not party to the lawsuit. Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1226 (8th Cir. 1981). When apportioning negligence, the jury must have the opportunity to consider the negligence of all parties to a transaction whether or not they be parties to a lawsuit and whether or not they can be liable to other tort-feasors because of prior release. Lines v. Ryan, 272 N.W.2d 896, 902-903 (Minn. 1978). Except for

those rare cases where there is no dispute in the evidence and the fact finder can come to only one decision, apportionment of causal negligence is for the jury. Riley v. Lake, 203 N.W.2d 331, 340 (Minn. 1972). In a negligence case, the jury should be allowed to consider the separate fault of all the persons involved, even when a person cannot be liable because of a prior release, but the form of the special verdict is within the trial judge's discretion to aggregate the fault of the persons involved on a special verdict form. Schendel v. Hennepin County Med. Ctr., 484 N.W.2d 803, 808-809 (Minn. App. 1992).

The district court agreed that Mr. Bradley didn't know how to look through the Mark II contract. Tr. P. 791. The district court stated that MHA had done a disservice to the City of Moorhead. Tr. PP. 791-792.

**H. The District Court Should Have Granted Anda's Motions For Summary Judgment Or Judgment As A Matter Of Law Arguing That He Was Not Liable For Clean Up Costs**

MEDA was given extra time to "conduct discovery to test respondents' denials of negligence". Add. P. 7. By the time of the second motion for summary judgment, MEDA showed nothing more than Anda had been a minority owner of HOP, and the condemnation uncovered an old tank.

During the trial Anda made two Rule 50.01 motions for judgment as a matter of law, Tr. PP. 904 and 1150, because during the trial MEDA still had produced no showing of negligence. The district court should have granted those motions, and the issue of negligence should not have gone to the jury. That is the issue now, not whether jury findings not properly submitted are clearly erroneous.

An order granting a summary judgment is reviewable de novo to see whether there are any genuine issues of material fact and whether the district court erred in applying the law. See Stringer v. Minnesota Vikings, 705 N.W.2d 746 (Minn. 2005).

On an appeal from summary judgment, the court of appeals asks two questions: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. Northern States Power Co. v. Minnesota Metropolitan Council, App. 2003, 667 N.W.2d 501, review granted, reversed 674 N.W.2d 485.

The denial of a post-trial motion for judgment as a matter of law presents a legal question, which is subject to de novo review. Kidwell v. Sybaritic Inc., 749 N.W.2d 855 (Minn. App. 2008) and a district court's grant of a judgment as a matter of law is a question of law subject to de novo review. Longbehn v. Schoenrock, 727 N.W.2d 153 (Minn. App. 2007).

**I. Anda Received No Fair Trial Because Of The District Court's Constant Sua Sponte And Prejudicial Interruptions And Misstatement Of Anda's Burden Of Proof**

Anda did not receive a fair trial because the process was unfair, the court failed to follow the law, and the trial produced an unfair result. The errors of law, the interruptions and the problems with the instructions and special verdict forms are symptoms of an unfair trial.

Bad enough that the district court made its own objections to Anda's opening statement, examination of witnesses and closing arguments about 100

times, App. Tab No. 37, but in doing so, it miss-instructed the jury about Anda's burden of proof.

When Anda was attempting to cross-examine an expert about other possible sources of the contamination, the court interrupted saying that Anda could not ask the questions purely for speculation unless he had evidence of some other source. App. P. 250. Anda stood his ground, App. P. 250, but the court's response was that Anda could not "... get into purely widely speculative possibilities ... [or make] a wild guess ...". App. P. 251.

The jury was clearly instructed that Anda would be responsible for the clean up expenses unless he could prove that the contamination did not come from the HOP tank.

Rule 2.02 of the General Rules of Practice for the District Courts specifically prohibits a judge from interrupting the examination of witnesses, except where necessary to prevent a "miscarriage of justice or obvious error of law". App. P. 63.

It was fundamentally prejudicial that the district court promised to instruct the jury about the "value" of HOP, and then instructed it about the "fair market value" of HOP. This instructed the jury that only appraisal testimony on the value of HOP could be considered.

It was fundamentally prejudicial for the district court to interrupt the very end of Anda's second closing argument to limit Anda's argument about the value of HOP based on insured value, saying that insurance companies will not let a

landowner over insure property because there had been no such evidence. Anda had testified that one cannot over insure property and that insurance companies do appraisals.

It was improper for the district court and the court of appeals to base and uphold a finding of liability on nuisance where MEDA had thought so little of its nuisance claim, it withdrew it on the penultimate day of the trial, only to reinstate it on the last day of the trial, over Anda's objections, especially where the jury instruction on nuisance required a finding of negligence or other wrongdoing. Add. P. 58.

"Did the vent pipe have a sign on it that says, I am an oil tank vent pipe?" This was the district court's interruption when Anda was trying to explain why MHA, a private developer, App. P. 20, was contributory negligent in not checking for an underground tank before committing the HOP property to a clean site, App. P. 475.

The district court's interruption during Anda's cross-examination of one of MEDA's expert witnesses, in the presence of the jury, after Anda asked about "numerous nontank releases" was:

"I am going to allow you not to continue this line of questioning. You're asking purely for speculation. If you have some evidence, Mr. Minch, that any of these possible scenarios happened on this property, you can go there, but if you're just asking to speculate about all kinds of different things that might have happened elsewhere, no, your not going to do that." Tr. P. 625, Supp. R. P. 77.

Anda explained that it was up to MEDA to show what happened and that there were other possibilities. The district court, again in the presence of the jury, stated:

“You’re not going to get into purely wildly speculative possibilities unless you have got some evidence to back it up.”

Tr. P. 626, Supp. R. P. 78.

Thus the jury was clearly and unambiguously told by the district court that the leak had to come from HOP and any other source was “purely for speculation” and “wildly speculative possibilities”. Anda’s cross-examination was effectively eliminated, and the jury had to know, from that point forward, that Anda would have to pay.

As stated in *Bonderson v. Hovde*, 150 Minn. 175, 178, 184 N.W. 853, 854 (1921): Counsel may even be permitted on cross-examination, for the purpose of testing the skill and accuracy of the expert witnesses, to ask hypothetical questions pertinent to the inquiry, assuming facts having no foundation in the evidence. Citing, *Williams v. Great Northern Ry. Co.*, 70 N.W. 860, 864 (Minn. 1897).

“A comet laden with oil could have fallen out of the sky and buried itself in the ground, I suppose”, Tr. P. 628, Supp. R. P. 79, and “Pure fantasy”, Tr. P. 1159, Supp. R. P. 124, showed the district court’s attitude about MEDA’s burden of proving that the contaminated soil came from an 8 or 9 year old tank emptied and abandoned without incident in 1972 or 1973.

“Since the judge’s duties are of a judicial nature, he should not act as

counsel for a party by raising objections which the party should make.” State v. Gomez, 704 N.W.2d 499 (Minn. 2005) (quoting Hansen v. St. Paul City Ry. Co., 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950)), *reh'g granted* (2006). “To assume a partisan position is to desert the high position to which the judge is elevated, and assume the role of the advocate.” 704 N.W.2d at 499 (quoting Hansen). See also, Block v. Target Stores, Inc., 458 N.W.2d 705, 713 (Minn. App. 1990).

Irregular procedures or judicial conduct that may support a successful new trial motion include a judge’s exhibition of partiality or hostility to one of the parties, Schwartz v. Wenger, 267 Minn. 40, 124 N.W.2d 489 (1963), the failure of the judge to properly instruct the jury, Cambern v. Sioux Tools, Inc., 323 N.W.2d 795 (Minn. 1982), and comments by the judge concerning issues to be decided by the jury, Johnson v. O’Brien, 258 Minn. 502, 105 N.W.2d 244, 88 A.L.R.2d 577 (1960).

Influence which trial judge has over lay jurors is so great that he must be extraordinarily careful to avoid all acts, signs, words, gestures, or tones of voice which might indicate to the jury hostility or partiality toward litigant or counsel. Fortier v. Ritter’s Hairdressing Studios, Inc., 164 N.W.2d 897, 899 (Minn. 1969).

Judicial impartiality is the very foundation of the American judicial system. Greer v. State, 673 N.W.2d 151, 155 (Minn. 2004).

If there is even a hint of prejudice on the part of the trial court in the presence of the jury, reversal is required. Coneys v. New York, 48 A.D.2d 651, 652 (N.Y.A.D. 1975).

The leading Minnesota case is Hansen v. St. Paul City Ry. Co., 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950), where the court held that a judge's conduct must be "fair to both sides," and a judge should "refrain from remarks which might injure either of the parties to the litigation." A judge has a responsibility of striving for an atmosphere of impartiality during the course of a trial. Id. In Hansen, the Supreme Court ordered a new trial due to the trial court's continuous interruption of defendant's attorney during the trial and caustic clashes between the attorney and judge during trial. Id. at 264-65. A trial judge must not desert the high position to which the judge is elevated, and assume the role of advocate. Id. at 264.

#### **IV. CONCLUSION AND PRECISE RELIEF SOUGHT**

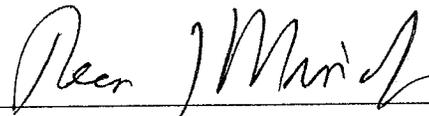
The Court should remand to a different Judge with instructions that it vacate the August 15, 2007, and August 29, 2007, judgments, App. PP. 138-139 and enter judgment against MEDA in favor of Anda for the \$455,000.00 awarded by the jury, App. P. 90, with interest at 6% per annum from June 29, 2001 and direct the Clay County Court Administrator to return, and if necessary, endorse the Certificate of Deposit given by Anda for a stay pending appeal.

The order on remand should direct that only Anda may, if he wishes, appeal from the \$455,000.00 judgment, and if does, he should have a new trial only on

the issue of the "fair value" of HOP as of June 29, 2001, with no evidence or testimony about the fuel oil tank, the contamination discovered after June 29, 2001, or any of the clean up costs.

The judgment on remand should determine, as a matter of law that Anda has not been negligent, did not create a nuisance, cannot be strictly liable, and thus the only issue, if Anda appeals, would be the fair value of HOP as of June 29, 2001.

Dated this 27<sup>th</sup> day of March 2009.



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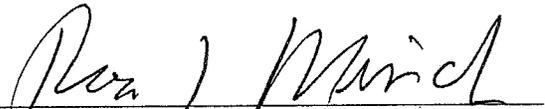
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**ATTORNEYS FOR APPELLANT**

**CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Appellant in the above matter, and as the author of the above Brief, hereby, certifies, in compliance with Rule 132.01, Subd. 3 of the Minnesota Rules of Appellate Procedure, that the above Brief, excluding words in the table of contents, table of citations, any addendum containing statutes, rules, regulations, etc. and any appendix, signature block, Certificate of Service and this Certificate of Compliance, which was done in Microsoft Word format, Microsoft Windows XP 2000, using Times New Roman font, totals 10,617 words.

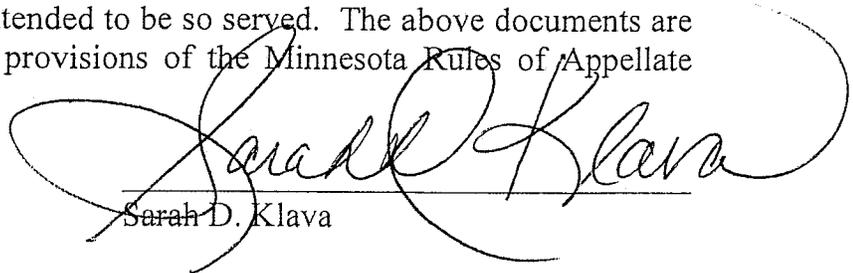
Dated this 27<sup>th</sup> day of March 2009.

  
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To the best of affiant's knowledge, the given addresses are the actual post office addresses of the parties intended to be so served. The above documents are mailed in accordance with the provisions of the Minnesota Rules of Appellate Procedure.

  
\_\_\_\_\_  
Sarah D. Klava

Subscribed and sworn to before me on March 27, 2009.

  
\_\_\_\_\_  
Hillary Hamilton  
Notary Public

HILLARY HAMILTON  
Notary Public  
State of North Dakota  
My Commission Expires Mar. 26, 2014